

# Judging in New-Born Democracies

JANE R. ROTH\*

There is an old story about a judge who started out a trial one Monday morning by announcing:

Ladies and Gentlemen, I have to disclose to you that on Friday evening Mr. Smith, the plaintiff's attorney in this case, came to my chambers and gave me \$5,000, asking that I decide in favor of his client. On Saturday morning, Mr. Jones, the defendant's attorney, came to my house and gave me \$10,000 to decide the case in his client's favor.

I want you all to know that I am going to return \$5,000 of Mr. Jones's \$10,000 to him and I am going to decide this case strictly on the merits.

We are lucky that in real life this type of situation rarely occurs in the United States. One of the luxuries of our judicial system is that we can feel confident, when we are litigating in our courts, that a judge will decide a case impartially, without accepting bribes or instructions either from the parties or from others who are interested in the outcome of the case.

There are other countries, however, that have not been so fortunate. For many totalitarian regimes, the concept of judicial independence is anathema. Before the fall of communism in the Soviet Union and its satellites, "telephone justice" prevailed.<sup>1</sup> It was not monetary bribes that tainted justice. It was instructions given to members of the judiciary by Communist Party officials. If a case was considered by the Party to be significant, the judge got a phone call from a Party leader with instructions on how to decide it.<sup>2</sup> The Party was the supreme source of authority and judges were rubber stamps who would carry out Party instructions.

The consequences of such a regime are diverse. Not only are the decisions of the courts skewed, but also in a society where judicial personnel are considered to be rubber stamps of the authoritarian state, the persons who choose such a career path are not always giants, either of intellect or of integrity. Moreover, if members of the legal profession are deemed to be little more than bureaucratic clerks, there will not be the glut of young people seeking a legal education that we see in this country.

---

\* Judge Roth is a member of the United States Court of Appeals for the Third Circuit.

<sup>1</sup> David K. Shipler, *Perspectives: Four Futures for Russia*, THE GUARDIAN, May 1, 1993 at 18.

<sup>2</sup> *Id.*

When one-party control was ended in the nations of the Soviet bloc and the citizens there set out to establish democratic governments, who would become the judges in these new democracies? Easy, it was the old judges—they would have to stay on. There were just not enough new, legally trained judicial candidates available to replace the judges of the old regimes. A few of the judges of the Communist era, those who had committed particularly egregious human rights violations, have been removed. But for the most part, the judges of the old regimes were carried over into the new.

The dilemma then becomes how to prepare the former dispensers of telephone justice to be members of an independent judiciary. An independent judiciary is vital to maintaining a democratic form of government. Only where an independent judiciary exists, can judges decide cases impartially and justly, without fear of repercussions from outside jarring influences. The “rule of law” requires that a judge not fear retaliation because of an unpopular decision. “Jarring influences” which disrupt the independence of a judge may result from the judge’s concerns about personal security, about working conditions, about reappointment and promotion, about salary, about work load and jurisdiction, about methods of judicial discipline, and about the respect accorded to the position of judge. Will the judges of the republics of the former Soviet Union and of its satellites be able to function in surroundings that are free from the disruptions which may affect their independence? It will be difficult to preserve their new democratic forms of government if they cannot.

Many Americans—judges, lawyers, professors, and diplomats—are very concerned that these judges, left over from the old, totalitarian regimes, need assistance in order to be able to fulfill their role as judges in a democracy. There are two areas in which instruction for these judges is especially crucial: in learning how an independent judiciary is created and operates and in expanding the judges’ knowledge of the law into areas of legal specialties that were not required in a communist economy.

There are two groups in this country that are particularly involved in providing this type of education to the judges of Central and Eastern Europe. First, the American Bar Association, through its Central and East European Law Initiative, known as CEELI, and, second, the Bureau of Human Rights and Humanitarian Affairs of the United States Department of State, in cooperation with the United States Information Agency. It is with this second group that I have been particularly active.

In August of 1991, I spent two weeks in Romania, presenting an educational program for judges. I was sent, along with five other judges, by the United States Information Agency. Accompanying me were Judge Patricia Wald of the U.S. Court of Appeals for the District of Columbia; Judge David Sam of the U.S. District Court in Utah; Judge Frank Kaufman of the U.S. District Court in Maryland; Judge Sam Bufford from the U.S. Bankruptcy Court in Los Angeles; and Judge Neli Johnson, a state circuit judge from

Oregon. Judge Johnson was born in Romania and lived there until she was fourteen. Fortunately for us, she spoke fluent Romanian.

We were invited by the Romanian Ministry of Justice to conduct a series of seminars for their judges and prosecutors. We spoke about our judicial system and how we, as judges, maintain our independence from the legislative and executive branches of our government. We discussed concepts of due process of law, of methods of constitutional interpretation, and of the legal remedies available in the United States to prevent abuse of citizens' rights by the police and by prosecutors—remedies which we apply through limits on pretrial detention and through prohibition of the use of coerced confessions and illegally seized evidence.

We found in our discussions with the Romanian judges that they were particularly interested in the procedures we follow in criminal trials: how an accusation is made through indictment by a grand jury; how we keep track of who is being detained before trial—and why someone is being detained; how attorneys are appointed to represent an accused; how illegally seized evidence is excluded from a trial. Our Romanian colleagues were familiar with some of these concepts. Interestingly, our legal system is best known in Romania through television shows such as *Jake and the Fat Man*, *Dallas*, and *Dynasty*. We were questioned closely about the ways in which our legal system is presented—and at times distorted—by the mass media.

One judge asked me about an American television movie he had seen in which a guilty criminal was allowed to go free because the evidence against him had been illegally seized. The Romanian found it difficult to believe that an obviously guilty man would be released because of misconduct by the police—the misconduct being the illegal search of the accused's home without a warrant. I realize that this result—letting a man you know to be guilty go free because of a technicality—gets the same reaction from many people here in this country. But this example of the exclusionary rule demonstrated an important safeguard of a democratic form of government. A dictatorship that requires brutal police tactics to survive will not flourish in a country where the courts will throw out a confession which has been obtained by torture and where the courts will open the prison door when a person is arrested and held without legal cause. So I thought it was ironic that a Romanian judge would be shocked by legal safeguards which, if in effect in his country twenty years ago, might have prevented Ceausescu from crushing any opposition that arose to his totalitarian rule.

However, despite the Romanian reaction to our exclusionary rule, I was very encouraged during our visit to hear the deep commitment to democracy that many of the Romanian judges expressed. I think that this commitment was in fact strengthened through their having the opportunity to communicate not just with us—the Americans—but to exchange ideas with each other. Communication between judges, be it formally through published opinions or

informally through seminars and discussions, is very important to the judicial process. One problem in Romania had been that the Supreme Court there had not been publishing its opinions. This lack of publication made each judge an island unto himself or herself. But justice requires consistency. Judicial independence cannot grow in a vacuum. A judiciary, which has been reduced to the bureaucratic stamp of approval for a dictator, cannot regain autonomy and prestige if the judges don't have available to them the rulings of the highest court and don't have a network among themselves to share their experiences. Consistency in statutory interpretation is essential in a society committed to the rule of law—so that the citizens can know what to expect in the courts and so that the courts can be fair and evenhanded in their decisions.

There was a genuine concern among the younger judges in Romania about becoming a more effective force than judges had been under Ceausescu. They were sensitive to the criticism that judges used to be merely a rubber stamp for the Communist Party—and a poorly paid rubber stamp at that. The counterargument, which we encountered from some judges and prosecutors, was that the court system there had never been involved in the human rights violations of the Ceausescu regime. They claimed that the mistreatment of citizens and the suppression of free speech and political opposition was done by the Party apparatus, before official legal or court proceedings were initiated. They contended that the courts hadn't been involved in any of Ceausescu's repressions. This may in fact be true—but, if so, it is not an endorsement for the courts to remain as they had been. One of the most important concepts that we American judges hoped to get across to the Romanians was the importance of preventing a recurrence of the former abusive regime by providing to the public a means of access to the courts in order that an individual might complain of mistreatment by government officials—in the event either of the misapplication or of the total evasion of the laws by such officials.

The main part of our program in Romania was a week of seminars given in the mountain resort of Poiana Brasov. We left Bucharest on the morning of Monday, August 19, 1991, to go up into the mountains. As we were leaving the Hotel Bucharest, we heard the first reports of the arrest of Gorbachev. Cable News Network (CNN) was not available in Romania and the news reports came only periodically—for the most part over the radio—in Romanian. As we drove off into the mountains, I couldn't help feeling a bit anxious that the world might be falling apart around us. This concern was intensified by the serious apprehension that was very evident on the faces of the Romanians traveling with us. It was very clear when speaking to the Romanians about their new democracy that they credited Gorbachev with making their liberation possible. Not only were they frightened that the overthrow of Gorbachev might lead to the return of dictatorship in Romania, but they were seriously concerned that a man, whom they greatly admired and to whom they felt

sincere gratitude for making possible the reestablishment of their freedom, was now in serious danger.

Later, when we saw television images of the demonstrations in Red Square and learned of the developing defeat of the coup leaders and of Yeltsin's emergence as the person in control of the situation, our Romanian colleagues expressed to us their relief and their hope that this rout of the hardliners in the Soviet Union would help safeguard the Romanians from the possibility that those same elements in Romania might be able to steal away their freedom. In these conversations, the Romanians repeatedly expressed their commitment to democracy. Since I have heard these heartfelt declarations that democracy would never again be crushed in Romania, I am convinced that any subversion or suppression of this new freedom will be difficult.

It was our experience that it is the young people who are the most committed to—and who will be the best protectors of—the new democracy. They are convinced that their society must be a free society. They want to know how this can be accomplished. Their minds are open and they are eager to learn about what we Americans do and how we do it.

These young people are an interesting contrast to many—but not all—of the Romanian judges of my generation. I was struck by the limited knowledge and the lack of curiosity of too many of the middle-aged Romanians. One Romanian friend called them the “lost generation.” When these now middle-aged judges were in their twenties and their thirties, they didn't dare explore or discuss matters that were outside the rigid limits of their jobs or of the necessities of their daily lives. To do so was to risk arousing the suspicions of the security police—the Securitate. If they inquired into matters that didn't concern them, they might be labeled subversives—so they learned only too easily to “Mind your own business!” I was surprised—and disappointed—to find that many Romanian judges my age knew very little about their own country and less about the world. The Revolution of December 1989 did not seem to have kindled any desire in them to open their minds and to begin again to learn. My questions to some of these older judges about the economy of the country, or agricultural problems—or even about aspects of the legal system outside their own immediate concerns—simply were not answered. They were in an intellectual rut. They are happy, I think, that the rut is a democratic one, but many of them would not be willing to risk their lives, or their livelihoods, to protect that democracy.

The younger judges, however, were of a very different mind-set. They were curious about what we, as American judges, do. But more importantly, they took individual pride in what they were accomplishing. One young judge boasted that she, on her own, had set up for herself the best judicial library in the country. Another had spent time in Strasbourg learning about the Human Rights Convention and she described her hope and the efforts she was pursuing to have that treaty adopted as law in Romania. The initiative of the younger

judges had not been stifled. They are determined to protect their democracy and to learn how to use their positions as judges to do so. One young judge commented about our program on the evaluation form we handed out, saying: "For me it was like an open window with the curtain removed."

Since my trip to Romania, I have had the opportunity to make two trips to West Africa to make similar presentations on rule of law and judicial independence. In January 1992, I was sent by the United States Department of State to Cotonou, in Benin, with a U.S. Magistrate Judge, Charles Vaccaro, to put on in French a program similar to the one we gave in Romania. Two years ago, the Beninese peacefully overthrew a Marxist dictator who had been in power for seventeen years. The older judges and lawyers there, who had been educated in France and in Senegal, wanted the younger judges to understand the more rigorous life of a judge in a democracy. We spent a week discussing our two legal systems, both how things were done and why they were done that way. We have found that the differences between our common-law system and the civil-law system, inherited from the French, are not an impediment to understanding the concepts of rule of law or of judicial independence.

From Benin, I went to Niamey in Niger where I spoke to judges, lawyers, prosecutors, news media representatives and university students—again in French. The people of Niger had just deposed a long-time military dictator. The judges there had the same concern as the Beninese—that the younger members of the judiciary understand their function in a democracy. I was particularly impressed by the interest of the university students in learning about our form of government. I spoke to an overflow crowd at the Law Faculty. By overflow, I mean that those who came too late to get inside the lecture room listened at the open windows. I spoke for forty-five minutes and then answered questions for over an hour. The students have few chances to hear outside lecturers and they were very reluctant to let me go even after two hours of talking.

Charles Vaccaro and I made a similar trip to the Ivory Coast and Guinea in May and June of 1993. Our arrival in Abidjan, the capital of the Ivory Coast, was disrupted by the announcement from the Ministry of Defense that our Conference on Rule of Law and Judicial Independence had been canceled. The Ivoirien President, Felix Houphouet-Boigny, was in Paris, the Prime Minister and Foreign Minister were in Libreville at the African-American summit, and the Minister of Defense had been left in charge of the government in Abidjan. He obviously was disturbed about permitting such a conference to take place under the aegis of his authority.

The telephone and cable lines between Abidjan, Paris, Washington, D.C., and Libreville were buzzing for two days before word finally came down that the conference had been reinstated. The Minister of Justice and the Minister of Higher Education gave their scheduled opening remarks and our discussions proceeded smoothly from there. The initial reaction to our presence

underscored in our minds, however, the fragility of the concept of judicial independence in many new democracies.

From Abidjan we went on to Conakry, the capital of Guinea. The economy of Guinea collapsed under the dictatorship of Ahmed Sekou Toure and it is just beginning to rise again from those shambles. However, the poverty of the people was not reflected in a poverty of expression. Democracy is awakening in Guinea and the discussions we had with judges, lawyers, and prosecutors there were much freer and more open to opposing views than what we had heard in Abidjan.

My understanding of the nature and function of judging has been expanded by my travels in Romania and West Africa. I can better appreciate the support that a life-time appointment and an adequate salary and staff give to my ability to remain impartial and independent. I also have a better appreciation of the contribution that our courts and our lawyers have made to maintaining our own democracy. As an incidental benefit, my own understanding of civil-law systems has grown.

More than benefiting the American participants, however, I believe that the most important contribution of our judicial exchanges has been the assistance we can give to the judges of these new republics in safeguarding their democracies. We are doing this by sharing our knowledge and our experience with them. The realization of rule of law in these countries will not, however, be an overnight accomplishment. Their economies are in terrible shape and the concept of a free market economy is still not well understood. There is justified concern that devastating economic and ecological problems may bring about the fall of these new governments. In Niger, I was asked by the Minister of Justice: "Can we really have a democracy when our stomachs are empty?" The answer to that question is a hard one. The very frank discussions we have had with the judges and lawyers in all these emerging countries gives me hope, however, that democracy will endure. In order for it to do so, rule of law must flourish. As a judge, I am enthusiastic about doing what I can to promote it.

